

1 T.H. GUERIN, JR. (#004837)
2 1839 South Alma School Road
3 Suite 354
4 Mesa, Arizona 85210-3028
5 480-838-9000

FILED

APR 04 2007

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY Christine D. [Signature]

6 **BEFORE A HEARING OFFICER**
7 **OF THE SUPREME COURT OF ARIZONA**

8 IN THE MATTER OF A MEMBER OF
9 THE STATE BAR OF ARIZONA,

NO. 05-2251

10 JAMES G. McELWEE, JR.,
11 Bar No. 012811

HEARING OFFICER'S REPORT

Respondent

12 **PROCEDURAL HISTORY**

13 The State Bar filed administratively suspended the Respondent on February 20, 2004 for
14 failing to comply with MCLE requirements.

15 A Complaint was filed on July 27, 2006 by the State Bar. Respondent was served on July
16 19, 2006.

17 A Tender of Admissions and an Agreement for Discipline by Consent and Joint
18 Memorandum in Support of the Tender of Admissions and Agreement for Discipline by Consent
19 (joint memo) was filed on December 4, 2006.

20 On February 22, 2007, a telephonic hearing was conducted on the settlement by Hearing
21 Officer 7R.

22 **FINDINGS OF FACT**

23
24 1. At all times relevant, Respondent was an attorney licensed to practice law in the
25 State of Arizona, having been admitted to practice on October 21, 1989.

26 2. Respondent was administratively suspended on February 20, 2004 for failing to
27 comply with MCLE requirements.
28

1 3. Respondent remains suspended.

2 4. On or about December 2000, the Complainants consulted with the Respondent
3 regarding filing a claim against the State of Arizona for injuries sustained by Ms. Johnson when
4 they were involved in a motor vehicle accident with a cow.

5 5. Ms. Johnson is the cousin of the Respondent and they requested legal advice as to
6 his options regarding the accident.

7 6. The Respondent agreed to assist Ms. Johnson because she was his cousin.

8 7. On February 8, 2001, an in-depth analysis of the case was e-mailed to Ms.
9 Johnson by Respondent.

10 8. The Respondent recommended that Ms. Johnson pursue the claim for her injuries
11 against Mr. Johnson's insurance company.

12 9. The Respondent then hired a private investigator to investigate the collision, and
13 learned that the fence had been deliberately cut and that the State was aware that the fence had
14 been cut.
15

16 10. In 2001, the Respondent filed a lawsuit against the State on behalf of the
17 Complainants.
18

19 11. The State denied the claim because the statute of limitations for a claim against
20 the State is only six months.

21 12. The Respondent failed to inform the Johnson's that the claim had been denied.

22 13. The Complainants attempted to find the status of their claim for approximately
23 two years without success, as the Respondent failed to respond to their messages and e-mails.
24

25 14. The Complainants contacted the Respondent's law firm and learned that he was
26 no longer employed there.
27
28

15. The Complainants attempted to contact the Respondent at his residence without success.

16. The Complainants filed their Complaint with the State Bar on December 30, 2005.

17. The Respondent admitted that he made a legal error about the statute of limitations, and that he had failed to communicate appropriately with the complainants.

18. The Respondent had left the practice of law and had no plans to return.

19. The Respondent was experiencing personal stress caused by the depression and because of his representation of the Complainant.

20. The Respondent suffered from insomnia caused by the and depression because of mounting work pressures, mounting litigation and other problems within his old law firm.

21. The Respondent is tremendously ashamed of and regretful of his ethical breaches.

22. The Respondent was open and honest in cooperating with the State Bar and reaching an Agreement for Discipline by Consent and a Tender of Admissions.

23. The Complainants did not present a statement for any loss or damages they may have suffered.

24. The Complainants did suffer a potential unspecified loss because of the Respondent.

25. The undersigned Hearing Officer accepts the Joint Memorandum in Support of Agreement for Discipline by Consent and a Tender of Admissions and Agreement for Discipline by Consent.

CONDITIONAL ADMISSIONS

Respondent conditionally admits that his conduct, as set forth above with respect to Count One, violated the following Rules of Professional Conduct:

1 1. Rule 42, Ariz.R.Sup.Ct., ER 1.3: Failing to act with reasonable diligence and
2 promptness in representing his clients;

3 2. Rule 42, Ariz.R.Sup.Ct., ER 1.4: Failing to properly communicate and keep his
4 clients reasonably informed about the statute of matters and to promptly comply with reasonable
5 requests for information;

6 3. Rule 42, Ariz.R.Sup.Ct., ER 1.16(d): Filing to protect his clients' interest after he
7 learned that the claim had been denied by failing to inform them of the result or his decision to
8 cease practicing law and/or by failing to surrender their file with he ceased practicing law.

9 4. Rule 42, Ariz.R.Sup.Ct., ER 8.4(d): Engaged in conduct that was prejudicial to
10 the administration of justice.
11

12 **ABA STANDARDS**

13
14 In determining the appropriate sanction, the parties considered both the American Bar
15 Associations' *Standards for Imposing Lawyer Sanctions* ("Standards") and Arizona case law.
16 The *Standards* provide guidance with respect to an appropriate sanction in this matter. The
17 Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. *In re*
18 *Peasley*, 208 Ariz. 27, 33, 35, 90 P.2d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157,
19 791 P.2d 1037, 1040 (1990).
20

21 In determining an appropriate sanction, the Supreme Court and the Disciplinary
22 Commission consider the duty violated, the lawyer's mental state, the actual or potential injury
23 caused by the misconduct and the existence of aggravating and mitigating factors. *Peasley*, 208
24 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

25 The parties and this Hearing Officer agreed the most serious misconduct in this case is
26 Respondent's failure to communicate properly with his clients by first not informing them that
27 the case had been dismissed and/or denied, and second by failing to communicate with them or
28

1 tell them of the dismissal for over three years. The parties and this Hearing Officer agree that
2 *Standards* 4.4, Lack of Diligence, and 4.6, Lack of Candor, are the most appropriate standards.

3 *Standard* 4.4 provides: Absent aggravating or mitigating circumstances, upon application
4 of the factors set forth in *Standard* 3.0, the following sanctions are generally appropriate in cases
5 involving the failure to act with reasonable diligence and promptness in representing a client:
6

7 4.42

Suspension is generally appropriate when:

- 8 (a) a lawyer knowingly fails to perform services
9 for a client and causes injury or potential
10 injury to a client; or
11 (b) a lawyer engages in a pattern of neglect and
12 causes injury or potential injury to a client.

13 *Standard* 4.6 provides: Absent aggravating or mitigating circumstances, upon application
14 of the factors set out in *Standard* 3.0, the following sanctions are generally appropriate in cases
15 where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

16 4.62

Suspension is generally appropriate when a lawyer
17 knowingly deceives a client, and causes injury or potential
18 injury to the client.

19 4.63

Reprimand [censure in Arizona] is generally appropriate
20 when a lawyer negligently fails to provide a client with
21 accurate or complete information, and causes injury or
22 potential injury to the client.

23 Based upon the conditional admissions in this matter, the presumptive sanction with
24 regard to the most serious admission of misconduct under *Standard* 4.4 and *Standard* 4.6 appears
25 to be suspension.

26 **DUTY VIOLATED**

27 Respondent failed to communicate properly with his clients by first not informing them
28 that the case had been dismissed and/or denied, and second by failing to tell them of the

1 dismissal for over three years. For the purposes of the agreement, Respondent admitted that his
2 conduct, taken as a whole, has violated his duty to the clients and to the profession.
3

4 **THE LAWYER'S MENTAL STATE**

5 This Hearing Officer agrees that the Respondent's conduct was negligent concerning the
6 statute of limitations and knowing regarding his subsequent failure to communicate with the
7 clients. In mitigation, the clients were relatives of Respondent and that personal relationship
8 affected Respondent's judgment. In addition, Respondent was suffering from depression during
9 the lengthy period of non-communication, and he ceased practicing law during that time. For
10 purposes of this agreement, and after consideration of the aggravating and mitigating factors and
11 the proportional case law, censure is appropriate.
12

13 **THE EXTENT OF THE ACTUAL OR POTENTIAL INJURY**

14 Respondent's conduct in this matter caused injury to the clients in that they were
15 deprived of the possibility of receiving compensation for the injuries received in their accident.
16 Due to Respondent's lack of diligence, his clients lost an unspecified potential for recovery.
17

18 **AGGRAVATING AND MITIGATING CIRCUMSTANCES**

19 The parties agree that the following factors should be considered in aggravation:

- 20 • Standard 9.22(b) – dishonest or selfish motive;
- 21 • Standard 9.22(i) – substantial experience in the practice of law.
- 22

23 Respondent's dishonest and/or selfish motives are the most serious aggravating factors.
24 Respondent was dishonest with his clients in not answering their calls because he knew that he
25 would have to tell them what happened, and he was selfish because he was trying to protect
26 himself from being sued by the clients and/or from embarrassment to his cousin.
27

28 The parties agree that the following factors should be considered in mitigation:

1 In *In re Hooper*, SB-04-0093-D (2004), Hooper was hired to expunge a felony conviction
2 and he advised the client that it could be done and that the client's civil rights would be restored.
3 Hooper filed a motion on his client's behalf, but the court rejected the motion. Hooper told the
4 client that it was rejected in error, and although Hooper prepared another motion, he never filed
5 it, thereby failing to protect his client's interest. Hooper failed to diligently work on the case or
6 communicate with the client, and, when Hooper did speak to his client, he led the client to
7 believe that he was working on the case, when in fact, he was not. Hooper also failed to respond
8 to his client's requests for information and failed to respond in the State Bar's investigation. For
9 violations of ERs 1.2, 1.3, 1.4, 1.5, 3.2 and 8.4(c) and (d), and Rule 53(d) and (f), Hooper
10 received a censure, one year probation (LOMAP) and was ordered to pay restitution. In
11 aggravation, there was bad faith obstruction of the disciplinary proceeding, vulnerability of the
12 victim and substantial experience in the practice of law. Three mitigating factors were found: an
13 absence of a prior disciplinary record, the presence of personal/emotional problems and physical
14 disability.
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17 In *In re Loftus*, SB-01-0070-D (2001), Loftus was retained in a dissolution matter but
18 failed to communicate with and to diligently represent his client, to abide by his client's
19 decisions concerning the objectives of the representation, and to expedite the litigation process.
20 Ultimately the dissolution matter was dismissed for lack of prosecution, and Loftus failed to
21 inform his client that the case had been dismissed. In another count, Loftus had been retained in
22 a breach of contract lawsuit that was referred to arbitration. Loftus failed to participate in
23 discovery. Defendants filed a motion to dismiss or preclude discovery and proceed to
24 arbitration, and Loftus failed to file a response. The court granted the motion and dismissed the
25 case with prejudice, and Loftus failed to notify his client that the case had been dismissed. For
26 violations of ER 1.1, 1.2, 1.3, 1.4, 1.16(d), 3.2 and 8.4, and Rule 51(h), Loftus received a censure
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1 and was ordered to pay restitution. Aggravating factors included prior disciplinary offenses,
2 multiple offenses, refusal to acknowledge wrongful nature of conduct, substantial experience in
3 the practice of law and indifference to making restitution. Two mitigating factors were found:
4 good character and reputation and the remoteness of the prior offense.

5
6 Finally, *In re Marko*, SB-01-0067-D (2001), is also proportional and the discussion by
7 the dissenting members of the Disciplinary Commission is helpful in making the determination
8 that Respondent's conduct in the matter at hand warrants censure. In the *Marko* case, the
9 respondent failed to communicate and diligently pursue a collections case and allowed it to be
10 dismissed for lack of prosecution. He then negligently misrepresented the status of the case to
11 the client, by virtue of an "update" letter that incorrectly stated there had been no change in
12 status on the case. The hearing office found, and the majority of the Commission agreed, that a
13 censure was appropriate pursuant to Standard 4.63, because there was no evidence that
14 respondent intentionally or knowingly misrepresented the status of the case. The letter may have
15 been generated simply based on a tickler entry.

16
17 Three members of the Commission dissented, stating that an informal reprimand was
18 more appropriate based on Marko's mitigation. Particularly important to the dissenting members
19 was the fact that Marko had voluntarily contacted the State Bar's LOMAP and asked for
20 assistance when he discovered that the client's case had been dismissed, and had also taken
21 appropriate action to protect the client's interests (the dismissal was without prejudice and
22 Marko refiled the case at his own expense). In the case at hand, Respondent did not inform the
23 clients about the missed statute of limitations for over three years, until after they filed a Bar
24 charge. The difference between Respondent's conduct and Marko's illustrates the difference
25 between an informal reprimand and a censure.
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1 The parties believe that this agreement provides for a sanction that meets the goals of the
2 disciplinary system. The terms of the agreement serve to protect the public, instill confidence in
3 the public, deter other lawyers from similar conduct and maintain the integrity of the Bar.

4 CONCLUSIONS

5 Recognizing that it is the prerogative of the hearing officer, the Disciplinary Commission
6 and the Supreme Court to determine the appropriateness of sanctions, the State Bar and
7 Respondent agree that, based on the Standards and relevant case law, a censure and two years of
8 probation is appropriate. Respondent's probation shall begin upon his reinstatement into active
9 status, with the terms and conditions of said probation to include a Practice Monitor and a
10 LOMAP and MAP assessment and subsequent contract, terms of which to be determined by the
11 Director of the Lawyer Assistance Program. In addition, Respondent shall pay the costs and
12 expenses incurred in this disciplinary proceeding. The State Bar and Respondent feel that this
13 constitutes an appropriate sanction under these circumstances.

14 The Court and the Commission have repeatedly stated that the purpose of lawyer
15 discipline is not to punish the offender but to protect the public, the profession and the
16 administration of justice. *Peasley*, 208 Ariz. at 41, 90 P.3d at 778; *In re Neville*, 147 Ariz. 106,
17 708 P.2d 1297 (1988). The proposed sanction will accomplish those goals.

18 RECOMMENDATIONS

19 That Respondent receive a censure and two years of probation. Respondent's probation
20 shall begin upon his reinstatement into active status, with the terms and conditions of said
21 probation to include a Practice Monitor and a LOMAP and MAP assessment and subsequent
22 contract, terms of which are to be determined by the Director of the Lawyer Assistance Program.

23 Respondent shall also pay the costs and expenses incurred in this disciplinary proceeding
24 in the amount of \$656.95.
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1 DATED this 4th day of April, 2007.

2 T.H. Guerin, Jr.
3 T.H. Guerin, Jr.
4 Hearing Officer 7R

5 Original filed with the Disciplinary Clerk
6 this 4th day of April, 2007.

7 Copy mailed this 4th day
8 of April, 2007, to:

9 James G. McElwee
10 Respondent
11 1850 North Central Avenue, Suite 2400
12 Phoenix, AZ 85004-4527

13 Patricia J. Ramirez
14 Bar Counsel
15 State Bar of Arizona
16 4201 North 24th Street, Suite 200
17 Phoenix, AZ 85016-6288

18 BY Christina [signature]
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